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NO. 80-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A.
AND VALSKY MARITIME, LTD.,
Petitioners

v.

JACK FISHER, ETC. AND
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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A few brief replies to some of the contentions in the Brief in Opposition may be helpful to the Court.

I. The Petition Presents A Legal Issue

Not unexpectedly, Respondents would convert the Petition for Certiorari into an attempt by Petitioners to have the Court review a "fact issue" already resolved against

them by the courts below. (Brief in Opp. p. 5-9). Such is not the case—the issue is clearly one of law! Taking all of the facts as "found" by the courts below with respect to the shipowner's activities in the United States,[1] it is a question of law whether the shipowner has thereby established a "substantial base of operations" under the rule of law established by the Court in *Rhoditis,* 398 U.S. 306 (1970). The fact that the lower courts may phrase their conclusions of law in terms of a "finding of fact," e.g., "seaworthiness," or "base of operations," does not prevent this Court from reviewing the interpretation placed by the lower courts on this Court's cases defining these legal terms.

The Petition here presents precisely the same type of reviewable legal issue as the one before the Court in *Usner v. Luckenbach Overseas Corporation,* 400 U.S. 494 (1971); i.e., this case involves the Court's definition of the term "substantial base of operations," while *Usner* involved the Court's definition of the term "unseaworthiness." In *Usner* the Court of Appeals below had held that a single negligent act by a fellow longshoreman could not render a ship seaworthy. After a brief review of the Court's seaworthiness decisions of the prior 25 years, Justice Stewart stated the issue before the Court quite succinctly:

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1. Even those which are unsupported by any evidence, such as, the shipowner derived substantial revenue from this vessel's only voyage to the United States. The only evidence on the issue shows the Charter Party (hiring of the ship) was executed in London, England for one trip only from the United States to Russia. The revenue (Charter Hire) from this one trip was to be paid to the Greek shipowners at their bank in Piraeus, Greece by the Panamanian corporation who had chartered the vessel. (App. p. 116-117, Exhibit Valmas #1, Time Charter, lines 12-14, 58-64)

". . . For the question here goes to the very definition of what unseaworthiness is and what it is not." 400 U.S. 494, at 498.[2]

The present Petition "goes to the very definition of what" a substantial base of operations "is and what it is not" under *Rhoditis.*

Petitioners here seek the same *Usner* type of review of the conclusion of law of the lower courts that Petitioners had a "substantial base of operations in the United States" under the criteria set out by this Court in *Rhoditis.* This Court has not only the power, but the obligation, to see

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2. This was not a new concept, but simply reaffirmed what the Court had held reviewable in at least three earlier cases:

1. In *Mahnich v. Southern S.S. Co.,* 321 U.S. 96 (1944), both of the lower courts held that a vessel having a defective rope on a staging, when other sound rope was available for use by seamen, was seaworthy. While recognizing that a finding of seaworthiness is usually a finding of fact, but because both courts below had so held as a matter of law based on this court's decision in *The PINAR DEL RIO,* this Court held that the lower courts' holding that the staging was seaworthy despite the defective rope was a "conclusion of law" that was reviewable by this Court. 321 U.S. 96, at 99.

2. In *Morales v. Galveston,* 370 U.S. 165 (1962), both of the lower courts held that a vessel was seaworthy. This Court granted certiorari to determine whether the introduction of a noxious substance from a source outside the ship, which the ship could not foresee, could as a matter of law, render the ship unseaworthy. This Court affirmed the conclusion of law by the lower courts that the vessel was seaworthy only because the lower courts had reached this conclusion "under proper criteria" from this Court's earlier decisions. 370 U.S. 165, at 171.

3. In *Waldron v. Moore-McCormack Lines,* 386 U.S. 724 (1967), certiorari was granted to determine whether assigning too few men to do a particular task made the vessel unseaworthy, after both the lower courts had concluded as a matter of law that it did not. This Court reversed and held that if the jury found as a fact that too few men were assigned to do the job, the correct conclusion of law would be that the vessel was unseaworthy.

that the lower courts have properly interpreted and applied its decisions in the *Lauritzen-Romero-Rhoditis* trilogy.[3]

That the courts below have not followed the trilogy and particularly *Rhoditis* is virtually conceded, for Respondents again decline the invitation to give both the Court and Petitioners the record citations to the evidence on which the courts below relied in concluding that Petitioners had a substantial base of operations in the United States. Obviously, this is because there is no such evidence. (Pet. for Cert. p. 9)[4]

II. Contract Is Enforceable And Petitioners Subject To Suit In Greece

Respondents assert the contract of employment requiring this action to be brought in Greece is not enforceable because not negotiated at arm's length. (Brief in Opp. p. 10-11) Aside from there being no evidence to support this assertion, the employment contract executed by the

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3. Please see full discussion in Petition for Certiorari, pages 5 to 10.

4. In its Petition for Rehearing in the Court of Appeals, Petitioners invited both Respondents and the panel of the Court of Appeals below to find any such evidence in the record as the Panel's decision did not cite any record references either. As the dissent filed upon the refusal to rehear the case en banc shows, the dissenting judges, like Petitioners, could not find such evidence either. (App. p. 30) In fact, Respondents further compound their misrepresentations when they assert Petitioners had hired two separate agents while the vessel was in Beaumont at the time of the casualty, again without any record citations where the alleged testimony from Petitioners can be found. What the evidence actually shows is that Petitioners' representative testified that he did not know whether the agent in Beaumont was one employed by the owners or one employed by the charterers. While the owners may have had one agent, it is clear it did not have two, and may even have had none! (App. p. 114)

Greek seaman in Piraeus, Greece expressly made the Collective Agreement between the Union of Greek Shipowners and the Panhellenic Seamen's Federation applicable to the decedent's employment aboard the vessel. And obviously the courts of the United States cannot take judicial notice that a collective bargaining agreement between management and a labor union has been entered into at less than arm's legnth.

In any event the Court has already held in *Lauritzen*, 345 U.S. 571, at 588-589 (1953), that such contracts are not against public policy, and there is no just reason why they should not be enforced.

The attempt, without any record citations to support it, to make the contract irrelevant on the grounds that the Petitioners are not subject to suit in Greece is unavailing and all of the evidence is to the contrary. The Petitioners all are owned, operated and managed from Greece, the vessel flies the Greek flag, and it is basic hornbook law that a corporation is subject to suit wherever it does business.[5] We reiterate here for the Court's convenience foot note 2 from our Petition for Certiorari, as it summarizes the evidence on this issue:

> "2. In footnote 15, page 272, the panel apparently gives some credence to plaintiffs' claim that a Greek forum is not available to the plaintiffs. The plaintiffs' Greek law expert (also counsel for plaintiffs in this case) testified they could have received compensation under Greek law 551 or elect to proceed in tort in Greece (T/P pp. 78-80). Defendants' legal expert

5. Companies doing business in Greece must appoint an agent for process. See Martindale, Hubbell Law Dictionary, 1981, Vol. VIII, Law Digests, Greek Law Digest, p. 3683.

also testified that the plaintiffs had these remedies available in courts of Greece (Domvros Dep. p. 21)." (Pet. for Cert., p. 7)

III. American Law Not Applicable In Greece

The Respondents contend that even if this action is tried in Greece that the Greek courts would apply American law and not Greek law. (Brief in Opp. p. 20-22) They rely upon the testimony of Professor Yiannopoulas, who is an attorney of record for Respondents, and named in a power of attorney from Mrs. Kepessidis as one of her legal representatives. Professor Yiannopoulas did not testify as the Respondents represent. The record reflects that he was specifically asked on direct and cross-examination, whether he was telling the district court that a Greek court would apply American law to this case. On direct examination by Respondents' attorney, he testified as follows:

> "Q. So, in substance, what that means in relation to this particular accident which occurred in Beaumont, what law would be applicable?
> A. I would prefer not to answer the question as specific as to this particular case. . . ." (T/P p. 78)

To be certain that the record clearly reflected that Professor Yiannopoulas was not testifying that American law would be applied if the suit was in Greece as Respondents now contend, this was his testimony on cross-examination by Petitioners' attorney:

> "Q. So then you are saying to us as you understand the Greek law if the beneficiaries of these Greek seamen had filed suit for his death in the courts

in Greece, that the Greek law would require the Greek court to apply the laws of the United States, because that's where the death occurred?

A. No, I am not saying that. That's why, you see, I was very careful when the counselor was asking on direct examination that I did not speak about a particular case before on this question. . . ." (T/P p. 111)

A more categorical denial of Respondents' contention that United States law would be applied by the Greek courts if the action was filed in Greece is difficult to imagine.

IV. Greek Law Was Proven And American Law Not Applicable

The Respondents next apparently contend that the law of the United States is to be applied because a different foreign law was not pleaded and proven. (Brief in Opp. p. 22, 23) This principle has no application to this case as Petitioners proved the law of Greece by taking the deposition in Greece of Mr. Nicholas Domvros, an attorney at law experienced in the law of Greece relating to personal injury and death claims by seamen and their beneficiaries. This was done because the trial court did not rule until the conclusion of the trial on the merits that American law was applicable. (App. p. 68, 69)

V. Petitioners Had No Remedies By Which It Could Obtain Earlier Ruling

Respondents suggest that because there has been a full trial on the merits and Petitioners did not utilize two sections of the United States Code to have the jurisdictional issue decided by the trial court before the trial

they should not now be heard. (Brief in Opp. p. 20) Neither section of the Code was available to Petitioners.

Section 1292(a)(3) of Title 28 was not available because it permits an appeal only from interlocutory decrees of the district courts which determine the rights and liabilities of the parties which the District Court's order did not do. (App. p. 48)

Section 1292(b) of Title 28 provides that an appeal can be taken from an order otherwise not appealable, if the district judge is of the opinion that it involves a controlling question of law. Petitioners specifically asked the district court, at the hearing on its Motion to Dismiss, whether the court would entertain an interlocutory appeal on the jurisdictional issue and were advised that the court would not approve an interlocutory appeal. Petitioners therefore did not have this remedy either.

In this same vein Respondents attempt to create the impression that our request that once Greek law has been held applicable that the action be dismissed for refiling in Greece is being made for the first time in footnote 11 on page 21 of our Petition (Brief in Opp. p. 24, footnote 14). Nothing could be further from the truth as this is precisely what we have been trying to get both of the lower courts to do almost since the day the suit was filed. The very first pleading filed by Petitioners only 21 days after suit was filed sought precisely such relief.[6] Petitioners

6. Suit was filed on June 28, 1976 and Petitioners' First Motion to Dismiss and to require the action to be filed in Greece was filed approximately 21 days later, on or about July 19, 1976. The two cases cited by Respondents (Brief in Opp. p. 24, footnote 14) are inapplicable as both involved long delays in seeking such relief—one involved a 16-months delay and the other involved such a request on the eve of trial. No such delay is involved here.

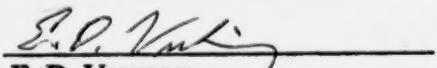
are also painfully aware that substantially all of the evidence in this case had to be taken in Greece because, in addition to paying its own attorney's expenses to Greece, the District Court made Petitioners pay the expenses of the attorneys for the Respondents (none of whom came to the trial in the United States) and those of the court reporter from Houston, Texas as a condition of Petitioners being permitted to take the depositions.[7] Petitioners seek in this Court precisely what they have always sought, and we submit, have been wrongly denied, in both of the courts below. Petitioners have done everything possible to avoid being here on the jurisdictional and choice of law issues both before and after the trial on the merits and, we respectfully submit, should be heard.

7. It is obvious that upon any retrial under Greek law, the Greek courts are the proper forum. Any evidence needed in addition to that already in the record will have to be obtained in Greece, and not in the United States.

CONCLUSION

Petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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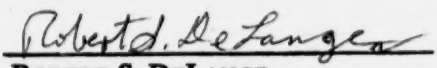

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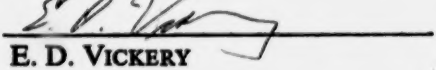
CERTIFICATE OF SERVICE

This is to certify that three copies of this Petitioners' Reply Brief have been served on all parties required to be served, i.e., on Respondents, by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record, in accordance with Rule 28.3, as follows: Mr. Paul Dué, of Dué, Dodson & deGravelle, 442 Europe Street, Baton Rouge, Louisiana 70802 and Mr. Frank A. Adams, of Adams & Adams, 2372 Calder Ave., Beaumont, Texas 77702, on the 29th day of July, 1981.



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